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No. 04-523

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN R. WYSS, et. al.,

Petitioners,

v.

CITY OF HOQUIAM, et. al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit No.: 04-35020

RESPONDENT CITY OF HOQUIAM'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. STATEMENT OF JURISDICTION

Petitioner Wyss does not address the applicability of the *Rooker-Feldman* doctrine, which is jurisdictional in this matter. The District Court held that the Petitioner's claims were inextricably interwoven with matters established in state review proceedings arising from Petitioner's appeal of the City's Notice and Order to Vacate and Demolish his dangerous building. The Court, therefore, held that under the *Rooker-Feldman* doctrine, it lacked the authority to disrupt the findings of the City administrative appeals board that were upheld after Petitioner's unsuccessful appeal to the State Court of Appeals. *Wyss v. City of Hoquiam*, 111 Wn. App. 1001, review denied 147 Wn.2d 1025 (2002).

The District Court correctly recognized the conflict resulting from the attempt in this action to seek damages under § 1983 after the state courts rejected the Petitioner's efforts to overturn the City's findings that his building was dangerous and constituted a public nuisance. Petitioner's federal action sought a second untimely bite at the apple to contradict the state findings and establish that his building was not dangerous, did not need to be vacated and was not a nuisance. The District Court held that such contentions are barred by the *Rooker-Feldman* doctrine. District Court Order, at 7-8.

The *Rooker-Feldman* doctrine precludes lower federal courts, including the District Court, from considering challenges to the final determinations of state courts. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.* 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). The only recourse for challenging such determinations is by appeal of the state court

decision to the United States Supreme Court, not by filing a new federal lawsuit under 42 U.S.C. §1983. *See Workwide Church of God v. McNair*, 805 F.2d 888, 890 (9th Cir. 1986). Wyss did not appeal the state court's rulings to the Ninth Circuit and has not addressed this issue in his jurisdictional statement in the Petition for Certiorari.

The *Rooker-Feldman* doctrine is jurisdictional and deprived the federal courts of jurisdiction to review a state court judgment, even if the plaintiff alleges constitutional claims or if the decision is not from the highest court of the state. *Dubinka v. Judges of the Superior Court*, 23 F.3d 218 (9th Cir. 1994). The doctrine also applies to administrative decisions reviewed by state courts, such as the City of Hoquiam Building Code Council decision at issue here. *Olson Farms, Inc. v. Barbosa*, 134 F.3d 933 (9th Cir. 1998).

By failing to assign error to the District Court's dismissal for lack of jurisdiction under the *Rooker-Feldman* doctrine, Wyss has abandoned his right to appeal this issue. *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170 (9th Cir. 1996); *International Union of Bricklayers v. Martin*, 752 F.2d 1401, 1404 (9th Cir. 1985). The Court should follow the well established rule that it will not consider claims that are not actually, specifically and distinctly argued in the courts from which review is sought. *Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997); *United States v. Richardson*, 418 U.S. 166, 206, 94 S.Ct. 2940, 2961, 41 L.Ed.2d 678 (1994). *Independent Towers of Washington v. Washington*, 350 F.3d 925 (9th Cir. 2003). Because Wyss failed to challenge a dispositive ground for dismissal of his case, the Court should not accept review of the Petition because the federal courts lack jurisdiction under the *Rooker-Feldman* doctrine.

II. STATEMENT OF FACTS

A. Statement of Facts and Procedural History

Petitioner submits a Statement of the Case which is riddled with errors and misstatements of the evidence presented to the District Court in Respondent City of Hoquiam's Motion for Summary Judgment. The correct facts, as established by the uncontradicted evidence presented to the District Court is set forth herein.

As noted by the Ninth Circuit's opinion, (Appendix at 25-26), the City moved for summary judgment based upon multiple expert declarations establishing that the building was an immediate danger requiring prompt action. Wyss offered no evidence to contradict the declarations of the City Building Official, Assistant City Fire Chief, City Code Compliance Officer, County Environmental Health Department and personnel from the Aberdeen Neighborhood Housing Service, who all testified that the building was dangerous to anyone that remained inside.

The building owned by John R. Wyss is located at 314 Lincoln Street in the City of Hoquiam. The building was over 75 years old and had a long history of complaints to the City. The building was a two story, eight unit apartment building with approximately 6,700 square feet. In January 1998, John Wyss contracted to buy the property, intending to rehabilitate the structure. However, despite his plans, Mr. Wyss did not obtain any permits from the City to conduct repairs. In April or May of 1999, Wyss began living inside one of the second floor apartments in the building. Mr. Wyss occasionally allowed his four year old son, John Russell Beamer Wyss to stay in the

building with him. He also was sometimes visited by guests, including minor children.

Soon after purchasing the building, Mr. Wyss contacted the County Assessor to request a reduction in his taxes. He informed the Assessor's Office that the building had no value due to its deteriorated condition. According to Mr. Wyss, the building actually had a negative value due to the high cost of repairs needed. As a result, the County reduced the assessed value of the building to zero.

On June 30, 1999, the City responded to further complaints and visited Mr. Wyss at the building. On July 23, 1999, the City conducted an inspection. The inspection team included the City Building Official, Susan Mollett,[1] the City Code Compliance Officer, Orlando Howell, Jim Tobey of the Grays Harbor Environmental Health Department, and Assistant Fire Chief Ray Pumphrey. Also present were Pat Beaty, a Construction Specialist, and David Murnen, Assistant Director for Aberdeen Neighborhood Housing Service, a nonprofit corporation that assists in obtaining affordable housing.

The conditions in the building revealed little progress in correcting the defects and making the repairs that Wyss had identified the previous year. The conditions observed by the inspectors clearly indicated that the building was a major hazard to anyone inside.

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[1] Subsequent to the filing of this lawsuit, Defendant Susan Vasey was married and is now named Susan Mollett.

The Building Official's Declaration, notes that the building was described by the August 31, 1999 order to be in a "dangerous and dilapidated state" with "serious safety and health conditions," "unfit for human habitation" and a "fire hazard." Her uncontradicted expert opinion testimony was that the building was immediately dangerous and threatened public safety.

The City Fire Marshal likewise determined the building to be an immediate fire hazard. It was so dangerous that fire crews were instructed not to enter the first floor. These statements were provided to the Petitioner as attachments to the City's August 31st order.

Likewise, the Grays Harbor County Health Department reported that the building was "unfit for human habitation and was a danger to all who entered it." Because, in Mr. Tobey's judgment, the building posed a "very great potential to cause grievous bodily harm to anyone inside of the structure should it collapse," he recommended that it be abated "as soon as possible, before being allowed to have further human habitation." Again, the Health Department report was attached to the City's order to notify Wyss that the building was a risk to anyone who occupied it.

Perhaps the most compelling evidence concerning the pervasive defects in the building at 314 Lincoln was demonstrated by a 21 minute videotape shot by the Aberdeen Neighborhood Housing Services. The tape, shot on February 29, 2000, shows the interior of the building after the completion of the hearing, as the City made preparations to demolish the building. Significantly, the dilapidated condition of the building

epicted by this tape was identical to the conditions observed uring the July 23, 1999 inspection.

Pursuant to the Uniform Code for Abatement of)angerous Buildings (hereafter "the Abatement Code") the 3uilding Official reviewed the reports and issued a Notice and)rder to Vacate and Demolish the building on August 30, 1999. 'he Notice and Order allowed Mr. Wyss 30 days to vacate the remises so that he would have time to remove his belongings nd move to alternative housing. It also informed him of his ight to appeal to the City Building Code Council (hereafter BCC").

Mr. Wyss did not vacate the building as required by the)rder. Instead, on September 21, 1999, he deeded the portion f the property not covered by the building to his four year old on, John Russell Beamer Wyss. Wyss admitted that the ossibility of a lien to cover the City's abatement was a factor in xecuting this deed. Shortly thereafter, he filed an appeal to the 'ity BCC on September 29, 1999. When the 30 day period to acate under the City's Notice and Order had elapsed, Mr. lowell posted "DO NOT ENTER" signs on the building as equired by Section 404.1 of the Abatement Code. He first osted these signs on October 5, 1999. The signs were removed nd the building remained occupied. On October 14, 1999, Mr. lowell again posted the building with the signs required by ection 404.1 of the Abatement Code. The building remained ccupied, as shown by ongoing electrical use, lights and Wyss' arked car next to the building.

The City Building Official was concerned about the risk f fire if the building remained connected to electricity. A fire ad recently broken out at a nearby abandoned building because

obsolete electrical wiring remained connected to power. To prevent a similar fire here, the City Building Official requested Grays Harbor P.U.D. to disconnect the electricity at 314 Lincoln.

The request to disconnect electricity was by a letter dated October 22, 1999 and was received by the P.U.D. on or about October 22, 1999. The City's letter advised the PUD that the building was declared a dangerous building and a nuisance and requested that power be disconnected.

Upon receipt of the notice that the Petitioner's building was dangerous, the P.U.D. disconnected the electrical service on October 22, 1999.[2] The City scheduled a hearing for November 10, 1999 to consider Mr. Wyss' appeal. This hearing was continued for good cause because the Building Official was ill with pneumonia. It was reconvened three weeks later on December 1, 1999. At that hearing, the BCC heard testimony from Mr. Wyss and City witnesses. Despite reservations over lack of progress in the 18 months that elapsed after acquiring the building, the council nevertheless voted to allow Mr. Wyss an additional 30 days to submit plans for rehabilitation of the building and apply for permits. Otherwise, it affirmed the Notice and Order to Vacate the building and denied Mr. Wyss' appeal.

Mr. Wyss was present when this decision was announced at the conclusion of the hearing. The BCC issued its written decision on December 8, 1999. As required by the Abatement Code, this decision was served on Mr. Wyss by certified mail at the address listed in the Assessor's tax records. It was also sent

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[2] Petitioner's Informal Brief at 3, ¶ 9.

to him by regular mail. The certified mail was returned, but the regular mailing was not. Mr. Wyss did not avail himself of the opportunity to seek permits for rehabilitation of the building. He did not submit rehabilitation plans or apply for any permits to rehabilitate the building. When the period for submission of these plans elapsed, the City began abatement proceedings by seeking demolition bids and contracting for an asbestos survey. On January 19, 2000, the City recorded a notice that the building had been declared dangerous, was ordered demolished and that the owner had been notified.

After the abatement process was commenced, on February 14, 2000, Wyss sent a check to the City and asked for a demolition permit. Mr. Wyss did not submit any plans, demonstrate how he would accomplish the demolition of the building and had, for over 18 months demonstrated his inability to follow through on promises to care for the building. In light of these factors, the City sent Mr. Wyss
a letter on February 22, 2000 returning his check and stating that the City would proceed with the abatement process. Mr. Wyss, however, had on that same day, February 22, 2000 filed a lawsuit in state court seeking to appeal the BCC decision.

Mr. Wyss' attempted appeal of the BCC decision was dismissed as untimely by the Grays Harbor County Superior Court on March 20, 2000. The Court determined, that the BCC decision had been properly served by the City on Mr. Wyss. This decision was upheld on appeal by the State Court of Appeals in an unpublished decision. *Wyss v. City of Hoquiam*, 111 Wn. App. 1001, No. 25907-9-II (Washington Court of Appeals, Division II, April 5, 2002), review denied, 147 Wn.2d 1025, 60 P.3d 93 (December 3, 2002).

The dismissal of Wyss' state court appeal affirmed the administrative decision of the City Building Code Council. The following facts were, therefore, conclusively established by the December 8, 1999 decision, as affirmed by the state courts:

1. Since at least 1998, the property has been the subject of numerous citizen complaints because of inadequate maintenance, dilapidation, decay, electrical wiring problems, etc. which has caused the property to constitute a public nuisance.

2. Wyss failed to obtain building permits for repairs or inspection for repairs that he claimed were performed. Wyss' testimony established that not all of the necessary work to abate the public nuisance was accomplished.

3. The building has wracked, warped, buckled and settled to such an extent that walls or other structural portions have materially less resistance to winds or earthquakes than required in the case of similar new construction.

4. Portions of the building are likely to collapse and thereby injury persons or damage property.

5. The building constituted a safety hazard to all occupants. It was unfit for human habitation and presented a potential rodent harborage. Further deterioration created a very great potential to cause grievous bodily injury to anyone inside the building or in the immediate vicinity should it collapse.

6. The building is a fire hazard, due to obsolescence, dilapidated condition, deterioration, damage, inadequate exits, and lack of sufficient heating apparatus.

7. The building is in such a condition as to constitute a public nuisance.

8. There is stress in materials, members or portions thereof, due to all live and dead loads which is more than two times the working stress allowed in the Building Code for similar new buildings.

9. Portions of the building are likely to fail, become detached or dislodged, or collapse and thereby injure persons or damage property.

10. The building or portions thereof are manifestly unsafe for the purpose for which it is being used.

11. The building has exterior walls or structural members that list, lean or buckle to such an extent that a plumb line passing through the center of gravity does not fall inside the middle one third of the base.

12. The building at 314 Lincoln is a "dangerous building" as defined by Section 302 of the Abatement Code.

13. The City's order to vacate the premises was AFFIRMED.

B. Correction of Misstatements in Petition for Certiorari.

The facts alleged in the Petition contain numerous errors and misstatements. Wyss describes the conditions in his building as "minor code violations" and states that there was "a need for typical repairs." Petition at 5, 20. In fact, the conditions were severely dangerous, as noted above, such that the building was determined by the Building Code Council to be manifestly unsafe and a public nuisance. The City's declarations showed that the building was an immediate fire hazard, was warped and buckled in places, lacked watertight roofing and siding (as evidenced by standing water inside light fixtures!), had water underneath the foundation and was missing flooring. The ingress and egress through first floor entrances was severely impaired because the building had settled by several feet.

Wyss contends that the City's order to vacate did not recite an emergency. Petition at 5-6. The City's notice contained inspection reports of the fire marshal and health inspector which found the building to be unsafe to all who entered.

Wyss contends that the courts below failed to analyze the City's actions to determine if they complied with applicable City codes, namely the Uniform Code for Abatement of Dangerous Buildings. Petition at 18-27. The answer to this charge is simple: Petitioner did not raise these arguments to the courts below and is barred from making new arguments in his petition to the Supreme Court. Indeed, many of the arguments that he now attempts to raise should have been made to the City Building Code Council at the hearing which followed the City's notice and order to vacate and abate the nuisance.

Wyss claims that he was "working to prepare the building for total renovation." Petition at 20. The unrefuted evidence presented to the District Court was that he had failed to make any substantial progress towards renovations for a year and a half prior to issuance of the City's Order. Nevertheless, Wyss could have then presented evidence of this renovation plan to the City Building Code Council. He failed to do so and did not present any such evidence in proceedings below. Wyss has never offered any explanation as to why, after the City Building Code Council gave him the opportunity to conduct repairs at the December 1, 1999 hearing, he failed to seek permits within the time period allowed. Moreover, Wyss' testimony of record in this case shows that he did not have any plan of renovation capable of curing the myriad defects in the building in any timely fashion. Wyss failed to take any meaningful action prior to the City's inspections. Instead, he chose to move into a

dilapidated, unsafe building, thereby threatening the safety of himself and his guests, which at times included his four year old child and teenagers living in the neighborhood.

Petitioner alleges that City officials caused greater damage and deterioration (Petition at 7, 22) were not supported by any evidence. His claims that City officials shut down fans, or a ventilation system, broke down doors and allowed the property to be vandalized are completely unfounded. None of the City's witnesses even recalled seeing a "ventilation system" in the building. Wyss presented no evidence that the City made conditions worse. The City's witnesses testified that the conditions observed in February 2000, after Wyss had been given a full hearing by the City, were virtually identical to the dilapidated and dangerous conditions observed when the original notice and order to vacate was issued in August 1999.

III. ARGUMENT

A. The Decisions Below Are Consistent With Well Established Precedent Holding That A Post Deprivation Hearing Satisfies Due Process Where There Is A Need For Quick Action To Protect Public Health And Safety.

1. The decisions below do not conflict with Supreme Court precedent.

Wyss claims that the City failed to provide procedural due process in issuing the orders to vacate and demolish the dangerous building located at 314 Lincoln in Hoquiam. However, his Petition fails to identify any conflict with the

decisions of this Court or with the decisions of any Circuit Court of Appeals.

The Supreme Court has often noted that due process is a flexible concept that varies with the particular circumstances of each case. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The core requirement of procedural due process is to provide notice and an opportunity to be heard at a meaningful time. *Id.*

Where there is a need for quick action, the dictates of due process are met by providing an opportunity to be heard after the deprivation occurs. *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). In *Parratt*, the Court recognized that not every deprivation of a property interest requires a prior hearing, especially where compelling interests such as the need to protect public safety demand immediate action by public officials charged with protecting health and safety.

The Petitioner relies on a portion of Justice Blackmun's concurring opinion in *Parratt v. Taylor*, but ignores the majority's holding that a post deprivation hearing may be justified under circumstances where there is a need for quick action to protect the public interest. In *Parratt v. Taylor*, the Court considered Petitioners' contention that a prior hearing is mandated by due process and cited numerous cases where the Court held otherwise. 451 U.S. at 538-541, citing *inter alia*. *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908) (seizure and destruction of unwholesome food without a preseizure hearing); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950) (seizure and destruction of drugs without a

preseizure hearing); *Fahey v. Mallonee*, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947) (immediate seizure of banking assets to protect against mismanagement); *see also Corn Exchange Bank v. Coler*, 280 U.S. 218, 50 S.Ct. 94, 74 L.Ed. 378 (1930); *McKay v. McInnes*, 279 U.S. 820, 49 S.Ct. 344, 73 L.Ed. 975 (1929); *Coffin Brothers & Co. v. Bennett*, 277 U.S. 29, 48 S.Ct. 422, 72 L.Ed. 768 (1928); and *Ownbey v. Morgan*, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1921).

In considering these cases, including those cited by the Petition, the Court in *Parratt* refutes Petitioner's argument, stating:

> However, as many of the above cases recognize, we have rejected the proposition that "at a meaningful time and in a meaningful manner" *always* requires the State to provide a hearing prior to the initial deprivation of property. This rejection is based in part on the impracticability in some cases of providing any preseizure hearing under a state-authorized procedure, and the assumption that at some time a full and meaningful hearing will be available.

451 U.S. at 540-541, 101 S.Ct. at 1915-1916.

Here Petitioner was given the prompt, full and meaningful hearing as contemplated by *Mathews v. Eldridge* and *Parratt v. Taylor*. However, because the building he previously occupied was an immediate danger, the Building Official acted properly in ordering him to vacate the structure. Nothing in the Petition demonstrates that the lower courts mis-applied the dictates of due process as set forth in these cases. Because

Petitioner misunderstands those requirements, he erroneously concludes that there is a conflict with

this Court's prior rulings. To the contrary, both the District Court and Ninth Circuit faithfully followed these well established precedents.

The rule urged by Petitioner would undermine the ability of public officials to protect public health and safety against immediate threats. A rule requiring a predeprivation hearing would prevent emergency posting of buildings damaged by natural disasters, such as earthquakes or hurricanes, in addition to those which become dangerous due to the systematic neglect of the property owner, as was the case here. Fortunately, this Court has established a better rule by allowing a prompt post-deprivation hearing in these types of cases. Petitioner suggests no reason to abandon this well reasoned line of cases.

2. <u>The decisions below are consistent with holdings in other Circuit Courts of Appeal</u>.

Petitioner fails to identify any conflict with cases from other Circuit Courts of Appeal. The due process principles articulated by *Parratt v. Taylor* have been expressly followed by various Circuit Courts of Appeal in cases involving immediately dangerous buildings. Petitioner cites no cases to support his contention that such a conflict exists. In *Harris v. City of Akron*, 20 F.3d 1396 (6th Cir. 1994), the Sixth Circuit rejected a procedural due process claim asserting that a hearing was required prior to demolition of a dangerous building. The Sixth Circuit held otherwise, stating:

> In *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), the Supreme Court explicitly held that in some situations a state may satisfy procedural due process by providing "some meaningful means by which to assess the propriety of the State's action at some time after the initial taking." *Id.* at 539, 101 S.Ct. at 1915. When the situation necessitates "quick action" by the state or makes efforts to provide a meaningful predeprivation process impracticable, the persons acting under state authority may proceed without violating the property owner's rights so long as the state provides an adequate postdeprivation procedure. *Id.* Such a procedure satisfies the "fundamental requirement of due process"--an opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.* at 540, 101 S.Ct. at 1915 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)).

20 F.3d at 1401.

Harris involved similar § 1983 claims including allegations that the city took property for a public purpose without paying any compensation, in violation of the Fifth Amendment, and deprived property without due process in violation of the Fourteenth Amendment. *Harris* involved an emergency demolition of a building, which occurred prior to any opportunity for the owner to have his objections heard. Like the Ninth Circuit held here, the Sixth Circuit in *Harris* held that in

such circumstances, a prompt post-deprivation hearing satisfied constitutional due process requirements.

In this case, the City's code provides for a predeprivation hearing in virtually all cases. The obligation to comply with an order to repair or demolish a dangerous building is stayed pending the outcome of these hearings, except for an order to vacate a dangerous building. Here, the City did not demolish the building before the hearing, but it did require that it be promptly vacated. The building was posted as required by Section 404 of the Uniform Code for the Abatement of Dangerous Buildings. Only when Petitioner refused to vacate the building, did the City request disconnection of electrical service, consistent with state utility regulations.

Section 504 of the Uniform Code for Abatement of Dangerous Buildings recognizes an exceptional circumstance where conditions are so dangerous that they threaten public safety and require vacation of a dangerous building under Section 404 of the Abatement Code. In these circumstances, public safety is the paramount consideration and the building must be vacated until a hearing is conducted to determine the validity of the City's determination. A postdeprivation hearing in the former situation is justified by the need for quick action to safeguard health and safety, as determined by the building official. *Parratt v. Taylor, supra.*

A full hearing with opportunity to call witnesses and cross examine City witnesses was held on December 1, 1999. The City Board of Appeals issued its decision ten days later containing findings of fact and conclusions of law. The decision upheld the order to vacate the premises. The Board upheld the factual determinations of the Building Official that the building

was a nuisance and was dangerous to all who entered it, including Mr. Wyss and any social guests. Wyss failed to timely appeal the Board's ruling and the state courts upheld dismissal of his untimely appeals.

The only Circuit Court case outside the Ninth Circuit cited by Petitioner does not conflict with the ruling in this case. *Freeman v. City of Dallas*, 242 F.3d 642 (5th Cir. 2001) upheld the City's condemnation and destruction of apartment buildings against a Fourth Amendment challenge. The Fifth Circuit's en banc opinion found that regulation of nuisances was at the heart of the City's police powers and was eminently reasonable. 242 F.3d at 652.

There is no conflict created here because the City of Hoquiam, like the City of Dallas, followed well established standards for determining whether a building is dangerous. Those standards are embodied in the Uniform Code for Abatement of Dangerous Buildings. The building official determined that the building violated these standards and her determination was upheld by the City Building Code Council after consideration of Wyss' appeal. The Ninth Circuit's decision here is fully consistent with the results and reasoning of the Sixth Circuit in *Harris* and the Fifth Circuit in *Freeman*.

B. Petitioner's Disputes With Conclusively Established Facts Do Not Justify Acceptance Of Review.

Petitioner fails to demonstrate any of the factors set forth by Supreme Court Rule 10 for acceptance of review. The Petitioner fails to identify any important question of federal law

that this Court needs to settle. Instead, Petitioner appeals solely to the sympathy of the court instead of demonstrating any errors by the lower courts.

Petitioner argues that his petition should be granted because he was living in the dangerous building which was his "home." Although it is a sad fact of life that some persons see fit to occupy neglected and unsafe structures, this does not overcome the clear and substantial interest of the City in the protection of human life, including that of the Petitioner. By requiring him to vacate the building, the City acted for his protection, and to protect others who occasionally visited the property, including minor children who Wyss periodically invited to the property.

The City's actions here are consistent with well established authority to safeguard the public under its police powers. *See Mugler v. Kansas*, 123 U.S. 623, 668-669, 8 S.Ct. 273, 31 L.Ed. 205 (1887) holding that no compensation is owed under the Takings Clause where action is taken to prohibit "noxious" uses of property--*i.e.*, uses of property akin to "public nuisances." Modern takings cases also acknowledge that a city may act to prevent serious public harm by abating nuisances without incurring liability for takings, even if all economically viable use of property is deprived. *See Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798, (1992). Because the City acted to protect public health and safety against a clear threat to public health and safety, no compensation is owed.

Petitioner Wyss cannot accept the factual rulings made in numerous prior proceedings by the City Building Code Council, by the state courts that upheld the City's rulings, as

well as by the District Court and Ninth Circuit. The Petition is based on allegedly erroneous factual determinations and does not identify any error in the lower court's statements of the applicable law. He can only allege that it was misapplied in his particular case. It is well established that such grounds are rarely sufficient to support granting of a Petition for a Writ of Certiorari. Supreme Court Rule 10.

IV. CONCLUSION

Petitioner failed to timely challenge the City's administrative findings and cannot seek to overturn them in this proceeding. Because the factual findings of the state Court of Appeals and City Building Code Council are inextricably intertwined with the civil rights allegations made by Wyss, the District Court properly refused to consider them under the *Rooker-Feldman* doctrine. On this basis alone, which was not challenged in the Ninth Circuit by Petitioner, the Court should reject the Petition for Writ of Certiorari.

The actions of the City here were valid exercises of the police power which respected Wyss' right to be heard. Petitioner was provided a timely and meaningful opportunity to be heard consistent with due process, before any demolition was required and promptly after being required to vacate this dangerous building. It is clear that Wyss had no property right consistent with background principles of property law to maintain his building in a dangerous, dilapidated and unhealthful state so as to constitute a public nuisance. The District Court properly determined that the City's requirement to abate such a nuisance is not a compensable taking. The District Court's

granting of summary judgment was properly affirmed by the Ninth Circuit.

Respectively Submitted this 17th day of November, 2004.

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